No. 86-1900 (4)

Supreme Court, U.S.
FILED
JUN 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEONARD PELTIER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE CATHEDRAL CHURCH OF ST. JOHN THE DIVINE, MOST REV. DESMOND M. TUTU, MOST REV. AND RT. HON. ROBERT RUNCIE, *ET AL.**, AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Canadian Friends Service Committee
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The Riverside Church
United Church of Christ
Disciples of Christ Christian Church
Religious Task Force

QUESTIONS PRESENTED

1. Did the Eighth Circuit misconstrue the Court's rulings in Bagley v. United States, United States v. Agurs, and Strickland v. Washington, to require a "probability of acquittal" standard for the materiality of Brady evidence suppressed by the government?

2. Where government suppression of critical witness statements prevents Jencks Act violations from being known or litigated prior to exhaustion of direct appeal, may such violations be raised in collateral proceedings?

3. Did the rulings of the court below, given the facts of this case, constitute a gross miscarriage of justice which should be remedied by the Court pursuant to its supervisory powers?

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AMICI

Amici curiae, leaders in the religious and civic arenas, are representative of the moral consciousness of the national and international community in their support of Leonard Peltier's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Amici are:

Dean James Parks Morton, Cathedral Church of St. John the Divine, the Cathedral of the Episcopal Diocese of New York;

Most Reverend Desmond M. Tutu, Anglican Archbishop of Capetown, South Africa;

Most Rev. and Rt. Hon. Robert Runcie, Archbishop of Canterbury;

Most Rev. Michael G. Peers, Primate, Anglican Church of Canada;

Most Rev. Edward W. Scott, Archbishop, Anglican Church of Canada;

Rt. Rev. Edmond L. Browning, Presiding Bishop, Episcopal Church, United States;

Rev. Jesse Jackson, Chicago, Illinois;

Rt. Rev. Craig B. Anderson, Episcopal Bishop of South Dakota;

Rev. Dan Anderson, Pastor, Christ Lutheran Church , Executive Director, North American Network (Interfaith);

Rt. Rev. Wesley Frensdorf, Episcopal Bishop of Navaholand;

Rt. Rev. Oliver D. Garver, Jr., Suffragen Bishop of Los Angeles;

Rt. Rev. Harold A. Hopkins, Jr., Episcopal Bishop of North Dakota;

Rt. Rev. H. Coleman McGehee, Episcopal Bishop of Michigan;

Rt. Rev. Paul Moore, Jr., Episcopal Bishop of New York;

Rt. Rev. John S. Spong, Episcopal Bishop of Newark, New Jersey;

Rev. Dr. Donald W. Anderson, General Secretary, Canadian Council of Churches;

Dr. Stuart E. Brown, Program Secretary for Traditional Religions, World Council of Churches, Geneva, Switzerland;

Rev. Dr. Edward Carpenter, Dean Emeritus of Westminster, England;

Rabbi Balfour Brickner, Sr. Rabbi, Stephen Wise Free Synagogue, New York, New York;

Rabbi Douglas E. Krantz, Head Rabbi, Congregation B'Nai Yisrael, Armonk, New York;

The Unitarian Universalist Association, a voluntary association of over 1,000 North American congregations, Boston, Massachusetts;

The Union Theological Seminary, a graduate school of Christian theology, New York, New York;

Native American Affairs Department, Anglican Church of Canada;

Jesuit Social Ministries, National Office, Washington, D.C.;

American Friends Service Committee, a Philadelphia-based organization founded in 1917 to implement the beliefs of the Religious Society of Friends, Philadelphia, Pennsylvania;

Canadian Friends Service Committee;

Clergy And Laity Concerned, a national interfaith network group devoted to human rights and social justice, New York, New York;

The Riverside Church, New York, New York;

United Church of Christ, New York, New York;

Disciples of Christ Christian Church, Division of Homeland Ministries;

Religious Task Force, a national interfaith and interracial coalition of over sixty religious groups with special peace and justice interests, Brooklyn, New York.

INTEREST OF AMICI

Amici are concerned with the rights and affairs of minorities, particularly those of the Native American community.

It is beyond argument that the treatment of Native Americans by the United States government is a blot on the pages of this country's history. Nor is there any doubt but that the activities of the government with regard to members of the American Indian movement ("AIM") in the 1970's, of which Leonard Peltier was a leader, has further undermined claims of equal justice for Native Americans. Indeed, the harassment and infiltration of AIM by the FBI, and the misconduct of the government in prosecuting cases against these Native Americans, have already been judicially determined. United States v. Banks and

Means, 383 F. Supp. 389 (W.D.S.D. 1974). Cf. United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976), cert. denied, 426 U.S. 917 (1979).

The present case cannot be viewed separate and apart from this historical backdrop. "Whatever the nature and degree of his participation at Oglala, the ruthless persecution of Leonard Peltier had less to do with his own actions than with underlying issues of history, racism and economics, in particular Indian sovereignty claims and growing opposition to massive energy development on treaty lands and dwindling reservations." P. Matthiessen, In The Spirit of Crazy Horse, xx (The Viking Press, New York 1983).

Amici, international representatives of disparate faiths and religions, join

together in this brief to support the efforts of Leonard Peltier to obtain a full and fair trial as a mission of justice. The international community has focused its attention on Leonard Peltier's case, and has universally condemned the investigative and prosecutorial tactics resulting in his conviction. Groups dedicated to supporting his legal efforts to obtain a new trial have been formed in many states of the United States, in Sweden, Mexico, Switzerland, Northern Ireland, Canada, Italy, Denmark, the German Democratic Republic, India, Holland and France. See Crazy Horse Spirit, 9 (Spring ed. 1985). Four Russian Nobel Prize winners have petitioned the United States government to set Mr. Peltier free, as United States scientists petitioned the Soviet

government on behalf of Dr. Sakharov, the physicist and human rights activist. New York Times, June 27, 1984, §A, at 3, col. 1.

The World Peace Council in Helsinki, Finland issued a position paper in December 1984 in Leonard Peltier's defense. Two major recent books have condemned the tactics used by the prosecution to obtain his conviction. P. Matthiessen, supra, J. Messerschmidt, The Trial of Leonard Peltier (South End Press 1983).

Amnesty International, a worldwide movement participating in the promotion and protection of human rights, has focused on Leonard Peltier's case in its 1981 "Proposal For A Commission of Inquiry into The Effect of Domestic Intelligence Activities on Criminal

Trials in the United States of America." In that comprehensive report, prepared before full knowledge was available of the critical evidence suppressed in this case by the FBI, Amnesty International was highly critical of the FBI's "disrespect for the law" in its investigation and prosecution.

The concern of the amici that justice has not been done in Mr. Peltier's case is heightened by the fact that two of his co-defendants were acquitted in a separate trial in Iowa before a different federal district judge whose evidentiary rulings were far more favorable to the defense than those of Judge Benson of the District of North Dakota in Mr. Peltier's case.* Moreover,

* See J. Messerschmidt, supra.

the government dropped the charges against the third co-defendant.

It is also of concern to amici that Judge Benson, who here refused to conduct an evidentiary hearing on the suppressed FBI materials until directed to do so by the Court of Appeals, was previously reversed for substantially prejudicing a jury against a Native American Indian in a criminal case. In United States v. Lavallie, 666 F.2d 1217 (8th Cir. 1981) the United States Court of Appeals found that Judge Benson sua sponte had given the jury a prejudicial instruction over the objection of defendant, "raising the stereotype of a 'drunken Indian' in the minds of the jurors" on an issue that was not even present in the case. 666 F.2d at 1219. The Court of Appeals reversed the conviction and found that "given the

great influence that a trial judge has on the jury, this instruction denied [the defendant of Indian descent] his right to a fair trial." Id.

The world-wide condemnation of the prosecution of Leonard Peltier cannot be minimized. If respect for the United States as a democratic society and the integrity of its judicial system is to be maintained, Leonard Peltier must be given the opportunity to defend the charges against him equipped with the critical exculpatory and impeachment evidence withheld from him at his trial.

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STATEMENT OF THE FACTS

Petitioner is currently serving two consecutive life sentences in prison, having been convicted of the 1975 murder of FBI Agents Coler and Williams on the Pine Ridge Reservation in South Dakota. The case against peitioner was entirely circumstantial, and critically dependent on the testimony of the government's ballistics expert, FBI Agent Evan Hodge. Hodge testified that a .223 bullet casing found in the trunk of Agent Coler's car near the bodies had been loaded into and extracted from a "Wichita AR-15" rifle which another government witness had associated with Leonard Peltier.

After his direct appeal had been exhausted, petitioner received previously suppressed documents from the government pursuant to the Freedom of Information Act. These documents include obvious

Brady material and Jencks Act material which directly contradict Hodge's testimony concerning the relation of the critical .223 bullet casing to the Wichita AR-15, and directly call into question the jury's finding of guilt.

Amici adopt the facts as recited by petitioner in his brief to the Court.

HOW THE QUESTIONS PRESENTED WERE RAISED AND DECIDED BELOW

Brady

Petitioner raised below the question of the proper interpretation and scope of the standard of materiality of suppressed exculpatory or impeachment evidence adopted by the Court in United States v. Bagley, 105 S.Ct. 3375 (1985).

In its application of "the rules set forth in Bagley" to this case, the court below found:

> (1) the government's theory at trial was that the petitioner killed the two FBI agents at pointblank range with a .223 caliber rifle described as "the Wichita AR-15", claimed to be associated with Peltier. Under this theory, "the ballistic evidence, particularly as that evidence relates to a .223 shell casing allegedly extracted from the Wichita AR-15 and found in Agent Coler's car is critical."

800 F.2d at 717 (emphasis added).

> (2) the government acknowledged in closing argument that its case against petitioner was based upon "circumstantial evidence."

800 F.2d at 717 n.1.

> (3) "questions regarding the FBI's handling and examination of the casing first arose at trial due to inconsistencies in the laboratory report. A February 10, 1976 laboratory report made by Evan Hodge, the government's ballistic expert, stated that the .223 casing . . . had been loaded into and extracted from the Wichita AR-15. In contrast, Hodge's October 31, 1975 report stated that: '[n]one of the other ammunition components recovered at the RESMURS scene could be associated with [the Wichita AR-15]'. At the time of this earlier report, Hodge had both the .223 casing and the Wichita AR-15 in his possession."

800 F.2d at 776.

> (4) the explanation of agent Hodge at the post-trial evidentiary hearing ordered by the Court of Appeals as to the reasons for his claimed delay in examining "the most important piece of evidence in this case" [800 F.2d at 775], (that he was not aware of any

particular urgency connected to the casing and had not received any priority request concerning it and the Wichita AR-15) was "facially inconsistent with the newly discovered evidence, which included several teletypes from FBI officials and agents specifically requesting Hodge to compare submitted AR-15 rifles with .223 casings found at the scene."

800 F.2d at 776.

(5) "[T]he newly-discovered evidence indicat[ed] Hodge may not have been telling the truth . . . "

800 F.2d at 777.

(6) "[W]e find that the prosecution withheld evidence from the defense favorable to Peltier."

800 F.2d at 775 (emphasis added).

(7) "[H]ad this evidence been available to the defendant, it would have allowed him to cross-examine certain government witnesses more effectively."

Ibid. (emphasis added).

(8) "One of the sources of discomfort with our decision is

> that although the defense was aware at trial of the inconsistencies, it was not able to demonstrate their importance because of an evidentiary ruling by the District Court."

800 F.2d at 777.

> (9) The ruling in question "refused to allow defense counsel to mention the dates of the [inconsistent] reports or any inferences to be drawn from the date in his argument to the jury. Since the primary impeachment value of the reports is that their timing creates an inference that the FBI lab may have changed its conclusion concerning the relation of the .223 casing found in Coler's trunk to the Wichita AR-15 only after it appreciated the alleged connection between the shell, the Wichita AR-15 and the murders, the argument forclosed by the ruling could have been significant."

800 F.2d at 777 n.8.

> (10) "If the newly discovered evidence had been available at trial [the evidentiary rulings below that prevented the defense from demonstrating the importance of the ballistic inconsistencies] might very well have been different."

800 F.2d at 777.

> (11) "In any event, the defense would have had substantial additional documentary evidence upon which to cross-examine Hodge and would have had greater reason to pursue the inconsistencies more vigorously than it did."

800 F.2d at 777 (emphasis added).

> (12) "There is evidence in this record [conceded fabrication of eye witness account affidavits submitted to the Canadian authorities which induced them to extradite petitioner] of improper conduct on the part of some FBI agents. . ."

800 F.2d at 777 (emphasis added). See also, United States v. Peltier, 585 F.2d at 335 n.18.

> (13) "There is a possibility that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available to him in order to better exploit and reinforce the inconsistencies casting strong doubts upon the government's case."

800 F.2d at 779-780. (emphasis supplied in part).

The court below concluded in affirming the opinion of the District Court denying a new trial to Peltier, "we are bound by the Bagley test requiring that we be convinced, from a review of the entire record, that had the data and records withheld been made available, the jury probably would have reached a different result. We have not been so convinced." 800 F.2d at 780.

Jencks Act

In the District Court and Court of Appeals below, petitioner raised a claim that the Jencks Act had been violated by the government in gaining his conviction. The District Court rejected these claims holding that "Peltier's

other alleged Jencks Act violations . .. have not been shown to be Brady violations, infringements of constitutional rights, or defects seriously affecting the fairness of the trial, and thus, cannot be raised in habeas corpus proceedings; they could be raised only on direct appeal." 609 F. Supp. at 1152. The Court of Appeals affirmed without discussion of these claims.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE EIGHTH CIRCUIT MISCONSTRUED THIS COURT'S RULINGS IN BAGLEY V. UNITED STATES, UNITED STATES V. AGURS and STRICKLAND V. WASHINGTON TO REQUIRE A "PROBABILITY OF AQUITTAL" STANDARD FOR MATERIALITY OF SUPPRESSED EVIDENCE

The court below held that the Bagley standard for materiality of suppressed evidence requires "that we be convinced, from a review of the entire record, that had the data and records withheld been made available, the jury probably would have reached a different result." 800 F.2d at 780 (emphasis supplied in part).

The "probability of acquittal" required by the court below is not the standard of materiality for suppressed evidence enunciated by this Court in United States v. Bagley, 105 S.Ct. 3375 (1985). In Bagley, the Court affirmed its rejection in United States v. Agurs,

427 U.S. 97 (1976) of "a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal." United States v. Bagley, 105 S.Ct. at 3383.

In formulating a standard for materiality which is consistent for the three types of suppressed evidence identified in Agurs, i.e., the knowing use of perjured testimony by the prosecution, the witholding of evidence after a specific request by the defendant, and the witholding of evidence after a general request by the defendant, the Court has adopted the standard of "probability sufficient to undermine confidence in the outcome" set forth in Strickland v. Washington, 466 U.S. 668 (1984). Bagley, 105 S. Ct. at 3384. In Strickland, in the context of a claim of

ineffective assistance of counsel, the Court held that a new trial was justified if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Court defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." Id.

Agurs, Strickland, and Bagley are clear statements by the Court that "probability of acquittal" is a much higher standard of materiality than "probability sufficient to undermine confidence in the outcome." The Court has repeatedly identified the "probability of acquittal" standard as the standard to be used only for evidence newly discovered from a neutral source. Bagley 105 S. Ct.

at 3383; Agurs, 427 U.S. at 111n19; Strickland, 466 U.S. at 693-694.

The "probability of acquittal" standard incorrectly applied by the Eighth Circuit required that the court find that there was a better than 50% chance of acquittal had the suppressed evidence been made available. This impossible burden was specifically rejected in Agurs and was not the holding of Bagley, which applied the far less stringent test in cases of government suppression of "a probability sufficient to undermine confidence in the outcome."

The Court specifically noted in Bagley that the standard of materiality for suppressed evidence necessarily was "more lenient to the defense than the newly discovered evidence standard" because,

> [t]he Court has recognized . . . that the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovreignity . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

Bagley, 105 S.Ct. at 3380n6.

The Court flatly stated in Agurs that where evidence is suppressed by the prosecution "the defendant should not have to satisfy the severe burden of demonstrating that the newly discovered evidence probably would have resulted in acquittal." Agurs, 427 U.S. at 111 (emphasis added). The Court recognized in Agurs that if the same standard of materiality were used for newly discovered evidence from a neutral source as for newly discovered evidence that had previously been suppressed by the prosecu-

tion, there is "no special significance to the prosecutor's obligation to serve the cause of justice." Id.

The Court moreover refused to use the harsh "probability of acquittal" standard of materiality for suppressed evidence specifically because "[t]he proper standard of justice must reflect our overriding concern with the justice of the finding of guilt." Id. (emphasis added). In explaining the standard of "a probability sufficient to undermine confidence in the outcome," the Court stated:

> [W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case . . . [That standard] comports with the widely used standard for assessing motions for new trial based on newly discovered evidence.

* * *

> The high standard for newly discovered evidence claims presupposes that all the essential evidence of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged . . . An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.
>
> * * *
>
> Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution (citing Agurs). . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

> undermine confidence in the outcome.
>
> * * *
>
> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.*

Strickland, 466 U.S. at 693-694 (emphasis added).

It is beyond argument that "adopting a standard of proof is more than an empty semantic exercise." Addington v. Texas, 441 U.S. 418, 425 (1979). Accordingly, the lower court's application of an incorrect standard of proof must be reversed. Its confusion of the "probability of acquittal" standard with

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* The Court of Appeals below failed to follow this standard. It found that the formerly suppressed evidence created "inconsistencies casting strong doubts upon the government's case" 800 F.2d at 779-780 (emphasis added), but failed to order a new trial.

the standard of "probability sufficient to undermine confidence in the outcome" undercuts this Court's decisions in Agurs, Strickland and Bagley and the specific policies governing the role of the prosecution within the criminal justice system and just procedures in the determination of the guilt or innocence of a defendant.

The court below specifically found that "the records and data [were] improperly withheld from the defense," 800 F.2d at 779-780, that the evidence was of critical importance, could have been effectively used by the defense, and may have resulted in an acquittal if disclosed. These findings more than satisfy the standard of "probability sufficient to undermine confidence in the outcome" of the trial. The court below, however, improperly applied the

"probability of acquittal" standard of materiality, and thereby failed to follow the Court's holdings. The Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in order to consider whether the Eighth Circuit has correctly applied the Court's decisions in Agurs, Strickland, and Bagley.

II. A WRIT OF CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER GOVERNMENT SUPPRESSION OF CRITICAL WITNESS STATEMENTS, PREVENTING JENCKS ACT VIOLATIONS FROM BEING KNOWN OR LITIGATED PRIOR TO EXHAUSTION OF DIRECT APPEAL, MAY BE REVIEWED IN COLLATERAL PROCEEDINGS

The Jencks Act reaffirms the Court's holding in Jencks v. United States, 353 U.S. 657, (1957),

> that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a

> government witness in possession of the government touching the events or activities as to which the witness has testified at the trial . . . . The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian.

Campbell v. United States, 365 U.S. 85, 92 (1961).

Leonard Peltier did not know of the existence of the suppressed statements authored by Agent Hodge, and therefore could not have made a claim under the Jencks Act, until direct appeal had been exhausted. It was only after certiorari on his direct appeal had been denied by the Supreme Court that Leonard Peltier received previously unproduced, redacted documents from the FBI files pursuant to a Freedom of Information Act request, 5 U.S.C. §552 (1982) (FOIA). Throughout the process of direct appeal, Mr. Peltier

was bound to accept the repeated misrepresentations of the government at trial that all of its discovery obligations had been met.

Where a defendant is aware at trial that statements of a government witness are being withheld, can raise an objection at that time, and can question the suppression of such evidence on direct appeal, Jencks Act violations are generally held, for those reasons, to be unreviewable in collateral proceedings: a "writ of habeas corpus will not be allowed to do service for an appeal." Sunal v. Large, 332 U.S. 174, 178 (1947); Houser v. United States, 508 F.2d 509, 513 (8th Cir. 1974) ("2255 cannot be used as a substitute for a direct appeal from a conviction"); United States v. Angelet, 255 F.2d 383, 384 (2d Cir. 1958) ("A motion under §2255 cannot ordinarily

be used in lieu of an appeal to correct [Jencks] errors committed in the course of trial.").

This same rationale has been applied in denial of collateral review to a claim of illegal search and seizure. See, Stone v. Powell, 428 U.S. 465 (1976). Thus, where the defendant has had an "opportunity for full and fair litigation" at the trial and on direct appeal, the slight social benefit of reviewing the claim collaterally does not outweigh the interest in finality of judgment. Id. at 494. The Court noted that any error committed "ha[d] no bearing on the basic justice of [defendant's] incarceration." Id. at 492.

Here, in contrast, petitioner has had no opportunity for litigation of his Jencks Act claim at all, and the

government's suppression of material evidence directly affected the finding of guilt.

Since the Jencks Act violations were not known and were suppressed until after Peltier's direct appeal had been exhausted, there is no logic in denying collateral review. Raising these violations in this collateral proceeding is not a substitute for direct appeal, but the only avenue for Peltier to have them reviewed. See Houser v. United States, 508 F.2d at 514 ("Those matters amounting to a denial of a fair trial, if proved, which could not have been raised upon appeal ... are generally cognizable under §2255." (emphasis added)).*

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* The Court of Appeals in United States v. McKenzie, 768 F.2d 602 (5th Cir. 1985) has explicitly recognized that where the defendant was not earlier aware of the
(Footnote continued on next page)

The Court has recognized that "exceptional circumstances" exist in which formalistic reasoning as to what may be collaterally reviewed is to be put aside.* Thus, issues not normally

(Footnote cont'd from previous page) existence of Jencks Act material, a Jencks Act claim is not waived at the trial stage by failure to assert it, and can be raised for the first time at least on direct appeal. "Defendants' failure to specifically request the district court to order production of this document does not affect their ability to raise this claim on a post-trial motion or on appeal because the defense was unaware of the transcript's existence until after the trial." Id. at 609 (emphasis added).

* Habeas corpus "should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice." Kuhlman v. Wilson, 106 S.Ct. 2616, 2623 (1986). See, Rose v. Lundy, 455 U.S. 511, 547-550(1982) (Stevens, J. dissent) (habeas corpus relief should not be denied due to "needless procedural hurdles" since its purpose is to ensure "fundamental fairness" in the system of justice).

reviewable on collateral proceedings are cognizable where the record establishes that defendant is not using §2255 as a substitute for direct appellate review. See Sunal v. Large, 332 U.S. 174, 183-184, (1947) (a prisoner "should be afforded an opportunity at some stage to establish the fact[s]. And where no other opportunity existed, habeas corpus would be the appropriate remedy. These [prisoners] had available a method... They did not use it. And since we find no exceptional circumstances which excuse their failure, habeas corpus may not now be used as a substitute" (emphasis added)).

In the "exceptional circumstances" created here by the government's admitted misconduct, Leonard Peltier had no opportunity on direct appeal to assert the egregious Jencks Act violations

committed during his trial. The Court should grant a writ of certiorari to consider whether previously unlitigated and unknown Jencks Act claims may be reviewed in collateral proceedings under the circumstances of this case.

III. A WRIT OF CERTIORARI SHOULD BE GRANTED BY THE COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS

It is critical to the continued integrity of our system of criminal justice that the investigation, trial and conviction of persons charged with serious criminal offenses not be tainted by governmental misconduct:

> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a

> private criminal -- would bring terrible retribution.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

The Court is charged with the duty to "establish and maintain civilized standards of procedure and evidence", McNabb v. United States, 318 U.S. 332, 340, (1943) and to that end it has supervisory powers over the administration of justice. Id. at 341. This supervisory power should be exercised whenever the proper administration of justice is endangered. Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115, 124 (1955). See also Elkins v. United States, 364 U.S. 206, 223 (1960); Rea v. United States, 350 U.S. 214, 216 (1956) (recognizing supervisory powers of federal courts over federal law

enforcement agencies); United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977).

Proof of misconduct by the government has tainted Leonard Peltier's conviction. The Court should grant a writ of certiorari in the exercise of its supervisory powers to preserve both the appearance and substance of justice and determine that Leonard Peltier is entitled to a new trial.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit.

Dated: New York, New York
June 26, 1987

Respectfully submitted,

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